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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 272

MILNER HOTELS, INC., OWNER AND OPERATOR OF TYLER HOTEL, PETITIONER

v.

PAUL A. PORTER, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION

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101 EAST FIRST STREET INCORPORATED, OWNER AND OPERATOR OF MILNER HOTEL, PETITIONER

v.

PAUL A. PORTER, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (R. 10–14) is reported at 62 F. Supp. 493. The opinion of the circuit court of appeals (R. 23) is reported at 154 F. 2d 1020.

JURISDICTION

The judgment of the circuit court of appeals was entered on April 8, 1946. The petition for a writ of certiorari was filed in this Court on July 5, 1946. Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. Sec. 347 (a)).

QUESTION PRESENTED

Whether the Price Administrator, in exercising his right under Sec. 205 (e) of the Emergency Price Control Act, as amended, to sue a landlord for damages where the overcharged tenant has not himself sued within 30 days after the violation, may recover in one action the statutory minimum of $25 multiplied by the number of tenants overcharged by the defendant.

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of the Emergency Price Control Act, as amended by the Stabilization Extension Act of 1944 (56 Stat. 23, 34; 58 Stat. 632, 640; 50 U. S. C. App. Supp. V, Section 925 (e)) and by the Price Control Extention Act of 1946 (Pub. Law 548, 79th Cong., 2d sess.) are set forth in the Appendix, pp. 9–12 *infra*. The Regulation involved is the Rent Regulation for Hotels and Rooming Houses (8 F. R. 7334).

STATEMENT

The petitioner in No. 272, Milner Hotels, Inc., owned and operated the Tyler Hotel, and the petitioner in No. 273, 101 East First Street, Inc., owned and operated the Milner Hotel, both in Louisville, Kentucky. Between July and October, 1944, Milner Hotels, Inc. charged and received from 54 separate tenants of the Tyler Hotel, rents in excess of those permitted by the Rent Regulation for Hotels and Rooming Houses (8 F. R. 7334), and 101 East First Street, Inc. did likewise as to 20 separate tenants of the Milner Hotel.[1] The total amount of the overcharges by the former was $31.50 and by the latter $13.50 (R. 10). It was stipulated that none of the violations committed was willful or the result of failure to take practicable precautions against their occurrence[2] (R. 9). No action on account of the overcharges was brought by any of the tenants. The district court awarded judgment to the Administrator in the sum of $1,350 in No. 272, and $500 in No. 273 (R. 14) computed on the basis of $25 for each of the tenants. (R. 10–14.) The circuit court of appeals affirmed on the grounds set forth in the district court's opinion. (R. 23).

[1] Pages 4–5, 9 of the Record in No. 272, pp. 4, 9 of the Record in No. 273. All other record references herein refer to identical pages in both records. The two cases were treated together by the court below and by petitioners here.

[2] Under such circumstances, Section 205 (e) of the Act as amended June 30, 1944, provided that the damage recovery was $25 or the amount of the overcharge, whichever is greater.

ARGUMENT

Under Section 205 (e) of the Emergency Price Control Act, as amended (Appendix, *infra*, pp. 9–11), each tenant overcharged by a landlord is entitled to recover against that landlord minimum damages of $25 or the amount of the overcharges, whichever is greater, and maximum damages of $50 or treble the overcharges, whichever is greater. Where as here, the violation is the result of neither wilfulness nor the failure to take practicable precautions against occurrence of the violation, the recovery is fixed at the above minimum amount. If the tenant fails to sue within thirty days of the overcharges, "the Administrator may institute such action on behalf of the United States." Accordingly, if a landlord overcharges one tenant by one dollar, the tenant is entitled to a minimum $25 recovery,[3] and if he does not sue, the Administrator may bring a similar action for an equal amount. If ten tenants are each overcharged by one dollar, each may sue for at least $25, and if none of them sues within thirty days, the Administrator may bring ten suits for at least $25 each.

As a matter of convenience, he may join these claims in one action, if he chooses. (Rule 18, Federal Rules of Civil Procedure.) His recovery will then be at least $250, the minimum total that

[3] And up to $50 if the landlord fails to prove freedom from wilfulness or the taking of practicable precautions.

could have been recovered through individual actions.

Petitioners have confused this rule with the principle made applicable by the Stabilization Extension Act of 1944, that where there had been a series of overcharges made by the same seller or landlord, *to the same purchaser or tenant,* the latter's recovery for *all* overcharges by the seller or landlord to that purchaser or tenant could range from a minimum of $25 or the single overcharge, whichever is greater, to a maximum of $50 or treble the overcharges, whichever is greater.[4]

It is thus apparent that the statement on p. 5 of petitioners' brief that "the court below held that O. P. A. must be placed in a more favorable position than the injured party", is erroneous.

[4] Previous to the 1944 amendment, it was generally held that where there was a series of overcharges, to the same tenant or purchaser, the recovery, whether on the basis of the $25–50 amounts or the overcharged amounts, could be cumulated. See e. g. *Walsh* v. *Gurman*, 132 Conn. 58, certiorari denied *sub nom Gurman* v. *Illg and Bowles*, No. 98, October Term, 1945; *Thierry* v. *Gilbert* 147 F. 2d 603 (C. C. A. 1); *Lambur* v. *Yates* 148 F. 2d 137 (C. C. A. 8). The amendments limited the cumulation of the $25–50 amounts by providing: (1) that all overcharges to the same tenant or purchaser made prior to institution of suit must be included in that suit, else those excluded could not be sued upon at all; (2) that in such suit for all past overcharges, the maximum recovery was $50 or treble all the overcharges, whichever was greater.

Each tenant who had been overcharged in these cases could have sued for $25. The Administrator has been put in the shoes of each such tenant, and his total judgment apart from costs and counsel fees was for the exact amount recoverable from the petitioners if each of the tenants had sued separately.

It may be noted finally that the decision of the court below accords with the recent Statement of the Managers on the Part of the House in explanation of the conference report on the Price Control Extension Act of 1946, which became law on July 25, 1946. The Statement reads:

> Section 12 of the Senate amendment relates to the enforcement provisions of section 205 (e) of the act. Subsection (a) prevents the cumulation of the Administrator's claims, except for three times the actual overcharges, where he brings a treble damage action based on overcharges to a number of buyers. *Under the present law,* the Administrator might sue a grocer for $5,000 because of 100 overcharges of 10 cents each to 100 different buyers. Under the amendment the maximum recovery in that lawsuit would be $50. Had the overcharges been 20 cents each, the maximum recovery would be three times the overcharges or $60. [Italics supplied.] (H. Rep. No. 2629, 79th Cong. 2d Sess. pp. 28–29).

The amendment was not made applicable to pending actions,[5] though other amendments[6] were

[5] The amendment (Sec. 12 (a) of the Price Control Extension Act of 1946), which accomplishes the change by broadening the introductory phrase to read: "In any action under this subsection," reads as follows:

"SEC. 12 (a). The second sentence of section 205 (e) of the Emergency Price Control Act of 1942, as amended, is amended to read as follows: 'In any action under this subsection, the seller shall be liable for reasonable attorney's fees and costs as determined by the court, plus whichever of the following sums is greater: (1) Such amount not more than three times the amount of the overcharge, or the overcharges, upon which the action is based as the court in its discretion may determine, or (2) an amount not less than $25 nor more than $50, as the court in its discretion may determine: *Provided, however*, That such amount shall be the amount of the overcharge or overcharges if the defendant proves that the violation of the regulation, order, or price schedule in question was neither willful nor the result of failure to take practicable precautions against the occurrence of the violation'".

[6] Thus, Sec. 12 (b) of the 1946 Act reads:

"(b) Section 205 (e) of the Emergency Price Control Act of 1942, as amended, is amended by adding at the end thereof the following new paragraphs:

"The Administrator *may not institute* any action under this subsection on behalf of the United States, *or, if such action has been instituted, the Administrator shall withdraw the same*—

"(1) if the violation arose because the person selling the commodity acted upon and in accordance with the written advice and instructions of the Administrator or any regional administrator or district director of the Office of Price Administration; or

"(2) if the violation arose out of the sale of a commodity to any agency of the Government, or to any public housing authority whose operations are supervised or financed in

specifically made so applicable. This harmonizes with the 1944 amendments to Sec. 205 (e), in that some of them were specifically applicable to pending actions but the amendment restricting cumulative recoveries by the same tenant or purchaser against the same seller or landlord was made applicable only to violations occurring after the amendment.[7] (See *Wash* v. *Gurman, supra; Thierry* v. *Gilbert, supra*).

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whole or in part by any agency of the Government, and such sale was made pursuant to the lowest bid made in response to an invitation for competitive bids.

"The Administrator *shall not institute or maintain* any enforcement action under this subsection against any manufacturer of apparel items where the Administrator shall determine (1) that the transactions on which such proceeding is based consisted of the manufacturer's selling such an item at his published March 1942 price list prices instead of his March 1942 delivered prices, and (2) that the seller's customary pricing patterns for related apparel items would be distorted by a requirement that his ceilings be the March 1942 delivered prices. The Administrator's determinations under this paragraph shall be subject to review by the Emergency Court of Appeals in accordance with sections 203 and 204." [Italics supplied.]

[7] Sec. 108 (c) of the Stabilization Extension Act of 1944 (58 Stat. 632) provided:

"The amendment made by subsection (b), insofar as it relates *to actions by buyers* or actions which may be brought by the Administrator only after the buyer has failed to institute an action within thirty days from the occurrence of the violation, shall be applicable only with respect to violations occurring *after the date of enactment of this Act.* In other cases, such amendment shall be applicable with respect to proceedings pending on the date of enactment of

CONCLUSION

The decision of the court below is correct, there is no conflict among the circuits and no question of substance is presented. The petitions should be denied.

Respectfully submitted.

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Office of Price Administration.

AUGUST, 1946.

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this Act and with respect to proceedings instituted thereafter." [Italics supplied.]

While the restriction of cumulative recoveries by the 1944 amendments was not made applicable to the Administrator's basic action based on violative sales to commercial purchasers, the more significant analogy to what was done in 1946 is what was done in 1944 as to *buyers'* actions. The 1944 restriction on cumulation had substantial significance only for the buyer's action; for in the Administrator's action based on violative sales to commercial purchasers, cumulation of the statutory $25–50 amounts generally arrived at a lesser total than cumulation of the overcharges. In other words the significant 1944 restriction on cumulation was not made applicable to pending actions, and this corroborates the apparent intent in the 1946 amendment as to cumulation.

APPENDIX

Section 205 (e) of the Emergency Price Control Act of 1942 (56 Stat. 23, 34) as amended by the Stabilization Extension Act of 1944 (58 Stat. 632, 640), 50 U. S. C. App. Supp. V, Sec. 925 (e):

> (e) If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may, *within one year from the date of the occurrence of the violation, except as hereinafter provided, bring an action against the seller on account of the overcharge. In such action, the seller shall be liable for reasonable attorney's fees and costs as determined by the court, plus whichever of the following sums is the greater: (1) Such amount not more than three times the amount of the overcharge, or the overcharges, upon which the action is based as the court in its discretion may determine, or (2) an amount not less than $25 nor more than $50, as the court in its discretion may determine: Provided, however, That such amount shall be the amount of the overcharge or overcharges or $25, whichever is greater, if the defendant proves that the violation of the regulation, order, or price schedule in question was neither wilfull nor the result of failure to take practicable precautions against the*

ocurrence of the violation.[1] For the purposes of this section the payment or receipt of rent for defense-area housing accommodations shall be deemed the buying or selling of a commodity, as the case may be; *and the word "overcharge" shall mean the amount by which the consideration exceeds the applicable maximum price.*[2] If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, and the buyer *either fails to institute an action under this subsection within thirty days from the date of the occurrence of the violation or is not entitled for any reason to bring the action, the Administrator may institute such action on behalf of the United States within such one-year period. If such action is instituted by the Administrator, the buyer shall thereafter be barred from bringing an action for the same violation or violations. Any action under this subsection by either the buyer or the Administrator, as the case may be, may be brought in any court of competent jurisdiction. A judgment in an action for damages under this subsection shall be a bar to the recovery under this subsection of any damages in any other action against the same seller on account of sales made to the same*

[1] As amended by sec. 108 (b) of Stabilization Extension Act of 1944. Formerly read, in place of italicized language: "* * * bring an action either for $50 or for treble the amount by which the consideration exceeded the applicable maximum price, whichever is the greater, plus reasonable attorney's fees and costs as determined by the court."

[2] Added by sec. 108 (b) of Stabilization Extension Act of 1944.

purchaser prior to the institution of the action in which such judgment was rendered.[3]

Section 12 of the Price Control Extension Act of 1946 (Pub. Law 548, 79th Congress, 2nd Sess.), amending Sec. 205 (e) of the Emergency Price Control Act of 1942 as amended:

SEC. 12. (a) The second sentence of section 205 (e) of the Emergency Price Control Act of 1942, as amended, is amended to read as follows: "In any action under this subsection, the seller shall be liable for reasonable attorney's fees and costs as determined by the court, plus whichever of the following sums is greater: (1) Such amount not more than three times the amount of the overcharge, or the overcharges, upon which the action is based as the court in its discretion may determine, or (2) an amount not less than $25 nor more than $50, as the court in its discretion may determine: *Provided, however,* That such amount shall be the amount of the overcharge or overcharges if the defendant proves that the violation of the regulation, order, or price schedule in question was

[3] As amended by sec. 108 (b) of Stabilization Extension Act of 1944. Formerly read, in place of italicized language: "* * * is not entitled to bring suit or action under this subsection, the Administrator may bring such action under this subsection on behalf of the United States. Any suit or action under this subsection may be brought in any court of competent jurisdiction, and shall be instituted within one year after delivery is completed or rent is paid. The provisions of this subsection shall not take effect until after the expiration of six months from the date of enactment of this Act."

neither willful nor the result of failure to take practicable precautions against the occurrence of the violation."

(b) Section 205 (e) of the Emergency Price Control Act of 1942, as amended, is amended by adding at the end thereof the following new paragraphs:

"The Administrator may not institute any action under this subsection on behalf of the United States, or, if such action has been instituted, the Administrator shall withdraw the same—

"(1) if the violation arose because the person selling the commodity acted upon and in accordance with the written advice and instructions of the Administrator or any regional administrator or district director of the Office of Price Administration; or

"(2) if the violation arose out of the sale of a commodity to any agency of the Government, or to any public housing authority whose operations are supervised or financed in whole or in part by any agency of the Government, and such sale was made pursuant to the lowest bid made in response to an invitation for competitive bids.

"The Administrator shall not institute or maintain any enforcement action under this subsection against any manufacturer of apparel items where the Administrator shall determine (1) that the transactions on which such proceeding is based consisted of the manufacturer's selling such an item at his published March 1942 price list prices instead of his March 1942 delivered prices, and (2) that the seller's customary pricing patterns for related apparel items would be distorted by a requirement that his ceil-

ings be the March 1942 delivered prices. The Administrator's determinations under this paragraph shall be subject to review by the Emergency Court of Appeals in accordance with sections 203 and 204."

U. S. GOVERNMENT PRINTING OFFICE: 1946